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IN THE

Supreme Court of the United States

KENNETH ANGARONE AND THOMAS MCGANN,
Petitioners,

v.

JOSEPH P. IENCO,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MARA S. GEORGES
Corporation Counsel of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel
MARC J. BOXERMAN
Assistant Corporation Counsel
City Hall, Room 600
Chicago, Illinois 60602
(312) 744-5337

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the absolute testimonial immunity that shields a witness from civil liability based on his testimony also immunizes a witness's failure to disclose prior to trial information that would contradict or impeach the witness's subsequent testimony.

PARTIES TO THE PROCEEDING

The petitioners are Kenneth Angarone and Thomas McGann. The respondent is Joseph P. Ienco. The City of Chicago was also a party to the proceedings below, and therefore is technically a respondent in this Court, although the petition raises no issue relating to the judgment in favor of the City of Chicago.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Chicago police officers Kenneth Angarone and Thomas McGann, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra* at 1a-12a), is reported at 286 F.3d 994 (7th Cir. 2002). The opinion of the district court (App., *infra* at 13a-25a), is reported at 148 F. Supp. 2d 938 (N.D. Ill. 2001).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on April 12, 2002. A timely petition for rehearing was denied on June 20, 2002. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1) (2000).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1. Section 1 of the Civil Rights Act of 1871, as amended, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1994).

STATEMENT

In August 1994, respondent Joseph Ienco ("Ienco") and another individual traveled from New York to collect a debt owed to Ienco's employer by a Chicago businessman, Jerome Greenberg ("Greenberg"). App., *infra* at 2a. To that end, "they paid a visit to Greenberg at his Chicago office, where they talked tough to Greenberg about the money that he owed to Ienco's boss." *Ibid.* They then left, "intending to return to Greenberg's office to engage in more aggressively threatening behavior, primarily with the aid of firearms and

explosives." *Ibid.* When they returned, however, Greenberg had summoned the police, and Officers Angarone and McGann of the Chicago Police Department eventually recovered incriminating evidence during searches of Ienco's rental vehicle and hotel room. App., *infra* at 15a. Ienco was subsequently charged with various federal offenses. App., *infra* at 3a, 16a.

Prior to trial on the criminal charges against him, Ienco moved to suppress the evidence Officers Angarone and McGann had recovered, alleging that it had been obtained as a result of an illegal search and seizure. App., *infra* at 3a. Ienco's motion was denied after a hearing at which testimony from both officers was received. *Ibid.*[1] Ienco was subsequently convicted. *Ibid.* The court of appeals vacated the conviction and remanded for a new suppression hearing and trial based on evidentiary and instructional errors. See *United States v. Ienco*, 92 F.3d 564 (7th Cir. 1996). On remand, a new district judge held a suppression hearing at which both officers again testified, and then granted the motion to suppress, finding that the testimony of the officers was not credible, and that the officers had in fact searched and seized Ienco and his effects in violation of the Fourth Amendment. App., *infra* at 3a-4a. The United States appealed, and the court of appeals affirmed. See *United States v. Ienco*, 182 F.3d 517 (7th Cir. 1999).

Ienco then brought this civil action under 42 U.S.C. § 1983 (1994), pressing in the district court only a claim that the officers were liable for malicious prosecution. App., *infra* at 4a. The district court granted summary judgment against Ienco, concluding that he had failed to adduce sufficient evidence to satisfy the elements of a section 1983 malicious prosecution claim. App., *infra* at 4a-5a. On appeal, Ienco

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[1] At this hearing, Officer Angarone testified in person, and Officer McGann's testimony was admitted through a stipulation. App., *infra* at 3a.

abandoned his malicious prosecution theory, and instead argued that the officers had deprived him of his right to a fair trial under the Due Process Clause, relying on *Newsome v. McCabe*, 256 F.3d 747 (7th Cir.), supplemented on denial of rehearing, 260 F.3d 824 (7th Cir. 2001) (per curiam), an intervening decision of the court of appeals holding that police officers could be held liable under section 1983 on such a theory. App., *infra* at 6a-8a.

The court of appeals reversed the judgment in favor of Officers Angarone and McGann.[2] On the defense of testimonial immunity, the court of appeals ruled that that defense was inapplicable because the court believed that Ienco's "claims are not based on the officers' perjured testimony." App., *infra* at 10a. Instead, the court concluded that Ienco's claim was properly based on allegations that "the officers withheld exculpatory information and lied to the federal prosecutors who successfully indicted him." *Ibid.* The court of appeals held that the officers lacked immunity on that claim because "no absolute testimonial immunity attaches to the officers outside of trial, and they are proper defendants in this action." *Ibid.* (footnote omitted).[3]

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[2] The court concluded that Ienco's failure to pursue a due process claim in opposition to the motion for summary judgment in the district court did not waive that claim for purposes of appeal since it was premised on the intervening decision in *Newsome*. App., *infra* at 7a-8a.

[3] On the officers' additional defense of qualified immunity, the court of appeals wrote that if Ienco's "allegations are proved, the officers' conduct violated clearly established federal law which was known or should have been known by a reasonable officer in 1995." App., *infra* at 11a. The court of appeals affirmed the judgment in favor of the City of Chicago, observing that Ienco had adduced no evidence demonstrating the existence of any municipal custom or policy of encouraging or tolerating perjury such as would be required to establish municipal liability under section 1983. App., *infra* at 11a-12a.

REASONS FOR GRANTING THE PETITION

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), this Court held that the doctrine of absolute testimonial immunity shields police officers from civil liability for their testimony against an accused in a criminal prosecution. Ienco's section 1983 claim against Officers Angarone and McGann to recover damages for his prosecution and conviction fits squarely within this immunity doctrine, since they procured his prosecution and conviction only by virtue of their willingness and ability to testify against him. Under *Briscoe*, witnesses are shielded from liability even if they procure a conviction by supplying testimony later alleged to be incredible or even perjurious, and that is precisely what happened here. Nevertheless, the court of appeals, after noting that Ienco claimed that the officers had failed to disclose prior to trial facts that might have undermined their testimony, denied them immunity on the ground that "no absolute testimonial immunity attaches to the actions of the officers outside of trial . . . ." App., *infra* at 10a.

Plenary review of the judgment below is amply warranted. There is serious disagreement in the federal appellate courts about whether testimonial immunity is confined to the act of testifying, as the court of appeals held in this case, or extends to pretrial conduct that is aimed at producing allegedly perjured testimony. In fact, eight other circuits have rejected the Seventh Circuit's view that a witness's immunity cannot shield pretrial conduct; only the Second Circuit has taken a position consistent with the holding below. Review is all the more necessary because the holding below effectively destroys the doctrine of witness immunity; a section 1983 plaintiff can always refashion a claim based on allegedly perjured testimony as a claim that a witness committed pretrial misconduct by failing to disclose his intention to testify perjuriously prior to trial. Hence, the holding below creates an exception to immunity that virtually swallows the

rule. Accordingly, certiorari should be granted to determine whether the doctrine of witness immunity is, at least in practical effect, to survive, and to review a holding that leaves police officers exposed to the precise burdens of civil litigation and potential liability from which this Court decreed they were to be spared in *Briscoe*.

1. There is a serious disagreement in the lower courts on the question whether the doctrine of witness immunity recognized in *Briscoe* reaches pretrial conduct. The circuits disagree about whether testimonial immunity under *Briscoe* is confined to the act of testifying, or reaches pretrial conduct that has no independent impact on the defendant but is instead merely preparatory to immunized testimony.

San Filippo v. U.S. Trust Co. of New Jersey, Inc., 737 F.2d 246 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985), was the first appellate decision to consider whether the holding of *Briscoe* immunized alleged pretrial misconduct aimed at producing allegedly perjured testimony. In that case, the plaintiff brought a "§ 1983 claim not based on defendants' testimony, but on their alleged *conspiracy* with the [prosecutor] to present false testimony and to withhold exculpatory evidence in the course of criminal proceedings." *Id.* at 254 (emphasis in original). The court rejected the claim of immunity, concluding that the holding in *Briscoe* "was expressly limited to immunity for testimony given in judicial proceedings, and its rationale—to encourage witnesses to come forward with all they know—does not justify extending that immunity to cover extra-judicial conspiracies between witnesses and the prosecutor to give false testimony." *Id.* at 255.[4] This holding is echoed in the holding of the court of appeals in this case that "no absolute testimonial immunity

[4] *San Filippo* itself did not involve a claim made against police officers, but the court's reasoning was applicable to all section 1983 lawsuits, and was later specifically applied to deny immunity to police officers in *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994).

attaches to the actions of the officers outside of trial . . . ." App., *infra* at 10a. But only the Second and Seventh Circuits have taken this position. Eight other circuits have rejected such an approach to witness immunity.

For example, in *Miller v. Glanz*, 948 F.2d 1562 (10th Cir. 1991), the court considered the plaintiff's argument, relying on *San Filippo*, that "*Briscoe* should not extend to conspiracies to present false testimony." *Id.* at 1570. The court rejected that view, reasoning:

> Allowing criminal defendants to seek damages under § 1983 for *conspiracy* among state witnesses to offer false testimony would give rise to the same systemic concerns noted in *Briscoe*. Instead of suing state witnesses for perjured testimony, a defendant could simply transform the perjury complaint into an allegation of a conspiracy to do the same. Moreover, an extension of *Briscoe* prevents self-censorship on the part of witnesses due to the fear of civil liability.
>
> Most importantly, in *Briscoe*, the Court pointed to various "truth-finding safeguards of the judicial process" that decreased the likelihood that perjured testimony will significantly harm or alter a just outcome at trial. These safeguards also apply to attempted conspiracies to give perjured testimony. At trial, the co-conspirator witness subsequently must take an oath, be subjected to cross-examination, and be scrutinized for credibility by the trier of fact. Therefore, after employing the functional approach, we must conclude that the defendants are entitled to immunity under the circumstances of this case.

Id. at 1571 (emphasis in original) (citations omitted) (quoting *Briscoe*, 460 U.S. at 344-45). As the Tenth Circuit later reiterated: "[W]e have expressly repudiated *San Filippo* . . . ." *Hunt v. Bennett*, 17 F.3d 1263, 1267 (10th Cir.), cert. denied, 513 U.S. 832 (1994).

And the Tenth Circuit does not stand alone. At least seven other circuits have held that absolute testimonial immunity extends to pretrial misconduct aimed at producing perjured testimony. See *Mowbray v. Cameron County*, 274 F.3d 269, 277-78 (5th Cir. 2001), cert. denied, 122 S. Ct. 1912 (2002); *Franklin v. Terr*, 201 F.3d 1098, 1101-02 (9th Cir. 2000); *Jones v. Cannon*, 174 F.3d 1271, 1288-89 (11th Cir. 1999); *Watterson v. Page*, 987 F.2d 1, 9 (1st Cir. 1993); *McArdle v. Tronetti*, 961 F.2d 1083, 1085-86 (3d Cir. 1992); *Alioto v. City of Shiveley*, 835 F.2d 1173, 1174 (6th Cir. 1987); *Moses v. Parwatikar*, 813 F.2d 891, 892-93 (8th Cir.), cert. denied, 484 U.S. 832 (1987). In *Franklin*, for example, the Ninth Circuit held that meetings among prospective witnesses prior to trial in an effort to ensure that they testified consistently with each other were within the scope of testimonial immunity. See 201 F.3d at 1102. Similarly, in *Jones*, the Eleventh Circuit held that nontestifying police detectives' meetings with a potential witness in order to suborn perjured testimony were immunized. See 174 F.3d at 1288-89. In *Moses*, the Eighth Circuit recognized immunity even though the complaint alleged that "the conspiracy began long before [witness's] involvement in the case." 813 F.2d at 892. And in *Watterson*, immunity was recognized on allegations that the defendants "conspired . . . to present false testimony and to withhold material evidence from the court . . . ." 987 F.2d at 9. Each of these holdings is squarely inconsistent with the holding in *San Filippo*, as well as the holding below that "no absolute testimonial immunity attaches to the actions of the officers outside of trial . . . ." App., *infra* at 10a.[5]

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[5] The Seventh Circuit itself once took the position that pretrial misconduct aimed at producing perjured testimony was within the scope of testimonial immunity. See *House v. Belford*, 956 F.2d 711, 719-21 (7th Cir. 1992). In the decision below, the court of appeals did not even mention *House*, perhaps agreeing with Ienco's suggestion below that its holding had been undermined by the subsequent statement in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), cert. denied, 513 U.S. 1085

Accordingly, there is outright inconsistency in the circuits on the scope of testimonial immunity. The Second and Seventh Circuits have held that testimonial immunity does not reach pretrial conduct, while eight circuits have held it does. This conflict in the lower courts alone warrants plenary review of the decision below.[6]

(1995), that "constitutional wrongs completed out of court are actionable even if they lead to immunized acts." *Id.* at 797. See App., *infra* at 19a n.8. We consider this case involves a constitutional violation "completed out of court" below. The Seventh Circuit, moreover, is not the only court of appeals to reverse its position on this issue. The First Circuit originally seemed to agree with the Second Circuit's view, see *Malachowski v. City of Keene*, 787 F.2d 704, 712-13 (1st Cir.), cert. denied, 479 U.S. 828 (1986), but later changed its position in *Watterson*, see 987 F.2d at 9.

[6] The court of appeals left open the possibility that even the officers' testimony could be denied immunity on remand under the so-called "complaining witness" doctrine. See App., *infra* at 10a n.9. This doctrine denies immunity to "one who procured the issuance of an arrest warrant . . . maliciously and without probable cause . . . ." *Malley v. Briggs*, 475 U.S. 335, 340-41 (1986). On this point as well there is a split in the circuits. Two circuits have held that the complaining witness doctrine deprives only a witness's role in procuring charges against an accused of immunity but never deprives actual testimony of immunity. See *Jones*, 174 F.3d at 1287-88 & n.10; *Kulwicki v. Dawson*, 969 F.2d 1454, 1467 n.16 (3d Cir. 1992). Two other circuits have held that the complaining witness doctrine denies immunity for testimony only for malicious prosecution actions based on a witness's role in initiating a prosecution and not in other types of section 1983 actions. See *Moore v. McDonald*, 30 F.3d 616, 619-20 (5th Cir. 1994); *Anthony v. Baker*, 955 F.2d 1395, 1399-1400 (10th Cir. 1992). Although the Seventh Circuit was silent on this point in the opinion below, it had also taken this position previously. See *Curtis v. Bembenek*, 48 F.3d 281, 285-86 (7th Cir. 1995). But two circuits have concluded without qualification that the complaining witness doctrine deprives a witness of immunity even for testimony itself. See *Harris v. Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998); *White v. Frank*, 855 F.2d 956, 959-61 (2d Cir. 1988). Thus, the potential applicability of the complaining witness doctrine to the officers' actual testimony only reinforces the need for plenary review, since the circuits are in conflict on how that doctrine is to be applied.

2. The holding below is also utterly irreconcilable with the doctrine of witness immunity and this Court's application of that doctrine in *Briscoe*.

The litigation before the Court in *Briscoe* was brought by three individuals who alleged that police officers had deprived them of their right to due process of law by committing perjury in the course of criminal proceedings. See 460 U.S. at 326-27. Considering the officers' defense of witness immunity, the Court observed that the common law had afforded witnesses absolute immunity from damages based on their testimony because, in the absence of immunity, "witnesses might be reluctant to come forward and testify," and "once a witness is on the stand, his testimony might be distorted by the fear of subsequent liability." *Id.* at 333. The Court found nothing in the legislative history of section 1983 suggesting that Congress had wished to discard this rule when enacting that statute. See *id.* at 336-41. The Court also refused to carve out an exception to the traditional rule of immunity for police witnesses despite their special responsibilities to the administration of justice, since exposing them to liability would impose enormous burdens on law enforcement officers and agencies. See *id.* at 342-45.[7]

In the decision below, the court of appeals endeavored to reconcile its holding with *Briscoe* on the basis that Ienco's due process claim could be premised not on the officers' testimony but upon allegations that "the officers withheld exculpatory information and lied to the federal prosecutors who successfully indicted Ienco." App., *infra* at 10a. The court added, citing this Court's decision in *Brady v.*

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[7] Although *Briscoe* itself involved trial testimony, the lower courts have universally understood its holding to reach testimony at pretrial evidentiary hearings as well. See, *e.g.*, *Curtis*, 48 F.3d at 284-85; *Moore*, 30 F.3d at 619-20; *Daloia v. Rose*, 849 F.2d 74, 75-76 (2d Cir.) (per curiam), cert. denied, 488 U.S. 898 (1988); *Holt v. Castaneda*, 832 F.2d 123, 125-27 (9th Cir. 1987), cert. denied, 485 U.S. 979 (1988).

Maryland, 373 U.S. 83 (1963), that "[n]either the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity." App., *infra* at 10a. But nothing in *Brady* or its progeny lends any support to the view that Ienco could advance a due process claim separate from the officers' immunized testimony.

Brady itself involved no claim of testimonial immunity from civil liability; for that reason alone it provides scant support for the holding below. Nor does *Brady* suggest that a due process claim can be based on pretrial misconduct alone and apart from what occurs at trial. In *Brady*, this Court held that the suppression of exculpatory evidence by the prosecution "violates due process where the evidence is material either to guilt or to punishment," not to achieve "punishment . . . for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U.S. at 87. The right recognized in *Brady* thus turns on the fairness of an accused's trial, not the nature of pretrial proceedings. In fact, "suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985). Cf. *Landrigan v. City of Warwick*, 628 F.2d 736, 744 (1st Cir. 1980) ("We do not see how the existence of a police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and laws."). That is why this Court has taken pains to point out that "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). Accord, *e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 434-37 (1995).

Thus, a due process claim under *Brady* necessarily depends on whether an accused's trial was unfair—not merely on whether someone suppressed exculpatory evidence prior to

trial. And here, the only asserted constitutional infirmity at Ienco's trial was the result of the officers' immunized testimony—if the officers had not testified about their search and seizure of Ienco and his effects, there would have been nothing unfair in the constitutional sense about Ienco's suppression hearing and trial. Thus, no *Brady* claim is possible here except one that rests on the officers' immunized testimony.[8]

To be sure, Ienco claims that the officers engaged in pretrial misconduct in the criminal proceedings against him—the officers allegedly falsified police reports and failed to disclose anything that might have suggested that their account of Ienco's arrest was false. This pretrial misconduct, while reprehensible, is of no constitutional significance in itself. As we explain above, the rule of *Brady* is not designed to punish misconduct, but to preserve the right to a fair trial. And the fairness of Ienco's trial was not compromised except by the officers' immunized testimony. No pretrial misconduct could produce a due process violation—a trial that was unfair in the constitutional sense—unless the officers testified at trial. Ienco's due process claim accordingly cannot be separated from the officers' immunized testimony, and for just that reason it founders upon their testimonial immunity. As the

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[8] Aside from *Brady*, the only other authority that the court of appeals cited in support of its holding was *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988). See App., *infra* at 10a. In *Jones*, however, none of the police defendants was alleged to have testified falsely, and no claim of witness immunity was before the court. See 856 F.2d at 992-96. Moreover, the claim in that case was for arrest and prosecution without probable cause rather than the denial of the right to a fair trial. See *id.* at 922. Indeed, the court in *Jones* took pains to acknowledge that "we do not reach the question whether damages could ever be awarded for such a [*Brady*] violation." *Id.* at 996. Moreover, the Seventh Circuit's decision in *Newsome v. McCabe*, on which Ienco relied to support his due process claim, itself cited only *Brady* and *Jones* to support its holding. See *Newsome*, 256 F.3d at 753.

Ninth Circuit put it when holding that immunity reached even pretrial meetings between witnesses in order to coordinate their anticipated testimony at trial, "because [the witness]'s alleged conspiratorial behavior is inextricably tied to her testimony, we find that she is immune from damages." *Franklin*, 201 F.3d at 1102. Or, as the Eleventh Circuit put it in *Mastroianni v. Bowers*, 173 F.3d 1363 (11th Cir. 1999), immunity bars claims that "are supportable . . . only by consideration of the actual contents of the allegedly perjured testimony . . . ." *Id.* at 1367.[9]

The holding below is also utterly inconsistent with this Court's decision in *Briscoe*, because it so completely eviscerates the immunity recognized in that case. The kind of pretrial conduct that the court of appeals identified here will always be present in cases where a plaintiff alleges police perjury. Under the holding below, whenever a police officer fails to disclose to prosecutors during pretrial interviews that he intends to commit perjury when he testifies at trial, a plaintiff can successfully argue that his claim evades testimonial immunity because the officer "withheld exculpatory information and lied to the . . . prosecutors . . . ." App., *infra* at 10a. But since "a witness rarely prepares her

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[9] The officers' underlying search and seizure of Ienco and his effects, of course, could be actionable under section 1983 if it violated the Fourth Amendment. See, *e.g.*, *Malley*, 475 U.S. at 340-41. Moreover, the officers would lack testimonial immunity on such a claim, since that doctrine does not reach nontestimonial conduct. See, *e.g.*, *Paine v. City of Lompoc*, 265 F.3d 975, 981-82 (9th Cir. 2001); *Jones v. Cannon*, 174 F.3d at 1289-90; *Spurlock v. Satterfield*, 167 F.3d 995, 1001-04 (6th Cir. 1999). Here, in fact, in the criminal proceedings, the court of appeals held that Ienco's Fourth Amendment rights were violated by the officers' search and seizure of Ienco and his effects. See *United States v. Ienco*, 182 F.3d 517 (7th Cir. 1999). But although a Fourth Amendment claim against the officers based on the underlying search and seizure would not be barred by testimonial immunity, it was time barred, as the court of appeals acknowledged. See App., *infra* at 11a.

testimony on her own," *Mowbray*, 274 F.3d at 277 (quoting *Franklin*, 201 F.3d at 1101-02), and police officers rarely announce their intent to testify perjuriously to prosecutors in their pretrial meetings, the exception to immunity crafted by the court of appeals effectively swallows the rule of immunity announced in *Briscoe*.

Indeed, the circuits that have extended *Briscoe*'s holding to pretrial misconduct have done so based on their recognition that any other result would enable plaintiffs always to eviscerate immunity by focusing on the witness's alleged pretrial scheme to commit perjury rather than on their subsequent testimony. See, *e.g.*, *Mowbray*, 274 F.3d at 277; *Franklin*, 201 F.3d at 1101; *Jones*, 174 F.3d at 1289; *Miller*, 948 F.2d at 1571. This Court has also recognized that claims based on the use of perjured testimony can always be recharacterized as based on the suppression of exculpatory evidence, and for that reason the immunity for the former would be wholly undermined if it does not reach the latter as well. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court rejected an argument that prosecutorial immunity should extend to the knowing use of perjured testimony but not to a prosecutor's pretrial failure to disclose exculpatory information about that testimony to the defense, explaining that

> the distinction is not susceptible of practical application. A claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested . . . . Denying absolute immunity from suppression claims could thus eviscerate, in many situations, the absolute immunity from claims of using perjured testimony.

Id. at 431 n.34. See also *Buckley v. Fitzsimmons*, 509 U.S. 259, 283 (1993) (Kennedy, J., concurring in part and dissenting in part) ("Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead

of the absolutely immune actions themselves."). The same reasoning applies here. Under the holding below, immunity for testimony is eviscerated by permitting section 1983 plaintiffs to reframe claims based on perjured testimony as based instead on the failure of police witnesses to disclose prior to trial facts inconsistent with their subsequent testimony.

3. Plenary review of the decision below is particularly urgent because that decision exposes law enforcement officials to the precise burdens of litigation from which this Court decreed they should be spared in *Briscoe*.

While burdening police officers who have allegedly failed to disclose exculpatory information that would undermine their subsequent testimony might seem desirable at first blush, this result ignores the powerful policy considerations that motivated this Court to recognize witness immunity in the first place. Criminal defendants who have been acquitted will frequently believe that police officers who testified against them lied, and a rule permitting the imposition of liability against officers who allegedly failed to disclose prior to trial that they intended to testify falsely will generate an enormous volume of litigation and impose a concomitantly enormous burden on law enforcement officials, as well as the judicial system itself. The Court explained in *Briscoe*:

> [T]o the extent that traditional reasons for witness immunity are less applicable to governmental witnesses, other considerations of public policy support absolute immunity more emphatically for such persons than for ordinary witnesses. Subjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties.

Section 1983 lawsuits against police officer witnesses, like lawsuits against prosecutors, "could be expected with some frequency." Police officers testify in scores

> of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the state's official witnesses. As the files in this case show, even the processing of a complaint that is dismissed before trial consumes a considerable amount of time and resources.
>
> This category of § 1983 litigation might well impose significant burdens on the judicial system and on law-enforcement resources. As this Court noted when it recognized absolute immunity for prosecutors in *Imbler*, if the defendant official "could be made to answer in court each time [a disgruntled defendant] charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." To some degree the individual's burden might be alleviated by the government's provision of counsel, but a case that goes to trial always imposes significant emotional and other costs on every party litigant.

460 U.S. at 342-44 (citations and footnote omitted) (quoting *Imbler*, 424 U.S. at 425) (brackets in original).

The Court's warning in *Briscoe* about the crushing burdens the law enforcement community will face if it must defend suits complaining about allegedly perjurious testimony is fully applicable to this case. Surely the staggering volume of litigation that will likely be brought against law enforcement officials under the holding below must, at a minimum, distract those officials from their important duties, and divert scarce public resources away from crime fighting to the defense of civil litigation.[10] To avoid that outcome, plenary review is necessary.

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[10] Moreover, the risk of personal liability for officers based on the performance of their police duties and its concomitant chilling effects on officers is quite real; in Illinois, for example, as is common in most states, local governments cannot indemnify public employees for awards of punitive damages against them. See 745 ILCS 10/2-102 (2000). Even to the extent that law enforcement officials may be indemnified for judg-

4. For these reasons, review of the decision below is fully warranted; and, in particular, it is warranted at this juncture. As we explain above, the doctrine of witness immunity is intended to spare public officials from the burdens of litigation, not only to protect them against judgments. Thus, if this and other cases must be litigated on the merits of the plaintiffs' claims, the critical protection that this immunity doctrine affords from the burdens of trial itself will be irrevocably lost, even if Officers Angarone and McGann and other section 1983 defendants ultimately manage to win these cases on their merits. Thus, although the judgment below is interlocutory in the sense that it remands this case for further proceedings, there is nothing interlocutory about the court of appeals' determination that police officers are to be denied protection from the burdens of litigation identified in *Briscoe* on the type of claim that is brought here.[11] And because of the breadth of the claim on

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ments against them as well as their litigation expenses, those costs are merely shifted to the taxpaying public, creating many anomalies not present in ordinary litigation, since the financial burden of litigation ultimately falls on the taxpaying public rather than the wrongdoers or even their employer. See generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000).

[11] Indeed, this Court has frequently granted certiorari to review decisions that deny public officials immunity from trial, even if further proceedings are envisioned under the judgment of the court of appeals. That is perhaps most evident in this Court's treatment of the defense of qualified immunity, which is also intended to spare public officials the burdens of discovery and trial. See, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 525-29 (1985). In six of its past seven Terms, the Court has agreed to review decisions denying qualified immunity even though further proceedings in the district court were required under the court of appeals' judgment. See *Christopher v. Harbury*, 122 S. Ct. 2179 (2002); *Saucier v. Katz*, 533 U.S. 194 (2001); *Conn v. Gabbert*, 526 U.S. 286 (1999); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Richardson v. McKnight*, 521 U.S. 399 (1997); *Behrens v. Pelletier*, 516 U.S. 299 (1996).

which the court of appeals denied immunity, the holding below effectively undoes the holding in *Briscoe*, leaving plaintiffs free in virtually every case to recharacterize a claim based on immunized testimony as a claim based on an officer's failure to disclose exculpatory evidence prior to trial. Accordingly, to preserve the testimonial immunity of police officers from practical annihilation, plenary review is required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMAN
Chief Assistant Corporation Counsel
MARC J. BOXERMAN
Assistant Corporation Counsel
City Hall, Room 600
Chicago, Illinois 60602
(312) 744-5337

* Counsel of Record

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 01-2395

JOSEPH IENCO,
Plaintiff-Appellant,

v.

CITY OF CHICAGO, a municipal corporation, P.O. Kenneth Angarone, individually and in his official capacity as a member of the Chicago Police Department, and P.O. Thomas McGann, individually and in his official capacity as a member of the Chicago Police Department,
Defendants-Appellees.

Argued Feb. 13, 2002.
Decided April 12, 2002.
Rehearing Denied June 20, 2002.

Before COFFEY, MANION, and WILLIAMS, *Circuit Judges.*

WILLIAMS, *Circuit Judge.*

Joseph Ienco was convicted of various federal weapons and extortion charges in April 1995. After raising several successful constitutional challenges to the manner of his arrest, his conviction was overturned and the indictment was dismissed. Seeking compensation for what he believed to be a wrongful prosecution caused by the actions of defendants City of Chicago ("the City") and two City police officers, Ienco brought an action under 42 U.S.C. § 1983. The district

court, in granting summary judgment for defendants, concluded that Ienco's state and federal malicious prosecution claims failed on the merits as a matter of law, because he could not prove that the defendants denied his substantive due process rights. Ienco appeals. During the pendency of his appeal, we decided *Newsome v. McCabe*, 256 F.3d 747 (7th Cir.2001), which held that federal malicious prosecution claims should not be examined under a theory of substantive due process, but must instead be analyzed under the due process clause directly. In light of *Newsome*, we reverse judgment as to the individual officers but affirm judgment as to the City.

I. BACKGROUND

A. Facts

Joseph Ienco operated as a real estate broker and rent collector, along with his associate Gregory Iovine. On the side, Ienco doubled as a debt collection enforcer. In August 1994, Ienco and Iovine were sent to collect payment from a Chicago businessman, Jerome Greenberg, who apparently owed a debt to Ienco's boss, a clothing importer. Ienco and Iovine traveled to Chicago and secured a hotel room and rental car. Shortly thereafter, they paid a visit to Greenberg at his Chicago office, where they talked tough with Greenberg about the money that he owed to Ienco's boss. Ienco and Iovine left, intending to return to Greenberg's office to engage in more aggressively threatening behavior, primarily with the aid of firearms and explosives.

When Ienco and Iovine returned to Greenberg's building, Greenberg saw them and called the police. Defendant Chicago police officers Kenneth Angarone and Thomas McGann soon arrived at the scene. What happened next is the source of much dispute. In brief, Ienco claimed that the officers conducted an unlawful search and seizure. The officers claimed that they received consent for all search and

seizure activity. What is not in dispute is that the search and seizure of Ienco and his associate began a chain of events that led the officers to discover that Ienco and Iovine's rental vehicle contained a variety of dangerous weapons. Acting with Iovine's tacit approval, government agents also discovered more incriminating evidence in Ienco and Iovine's hotel room.

B. District Court Procedural History

Ienco was charged with various federal crimes regarding his cache of illegal weapons and explosives and his attempts at extortion. As one might expect, he moved to suppress the physical evidence seized following his arrest, arguing that it was the product of an illegal search and seizure. At trial, these issues were initially discussed at length in a suppression hearing before Judge Duff. Judge Duff denied the motion to suppress, finding that the testimony of Officer Angarone was "complete, consistent, informed, careful, [and] professional." As a result of the denial of the motion to suppress, Iovine became a witness against Ienco--who was promptly convicted at trial. Officer Angarone testified at the suppression hearing and at trial. Officer McGann offered a stipulation for the suppression hearing and proffered testimony that was not introduced at trial. Ienco was sentenced to 425 months in prison, and he appealed.

In *United States v. Ienco*, 92 F.3d 564 (7th Cir.1996) ("*Ienco I*"), we reversed and remanded, finding that the district court committed several prejudicial errors, which required a new suppression hearing and trial. Pursuant to Circuit Rule 36, we assigned the matter to Judge Coar.

Judge Coar conducted a thorough review of the record on the motion to suppress. Both officers testified at the new suppression hearing. After weighing all available information, Judge Coar found numerous inconsistencies in

the officers' stories, concluding that "[i]n short, Angarone and McGann lied."[1] Appropriately, he suppressed the evidence. The government appealed.[2]

We affirmed. In *United States v. Ienco*, 182 F.3d 517 (7th Cir.1999) ("*Ienco III*"), we found that suppression of all physical evidence was warranted, because the officers lacked reasonable suspicion for a *Terry* stop and also unlawfully arrested Ienco. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). We did not extensively address Judge Coar's factual findings that the officers lied. However, we did note that the government did not appeal Judge Coar's findings of fact as to what actually occurred, effectively conceding that the officers' testimony was not to be believed. *See Ienco III*, 182 F.3d at 524, n. 4.

After our decision in *Ienco III*, the government dismissed the indictment. Shortly thereafter, Ienco brought the current action. Although Ienco initially alleged a host of constitutional violations, he eventually focused on a single issue: whether the defendants were liable under a malicious prosecution theory pursuant to Illinois state and federal law.

The district court, applying our precedent, concluded on summary judgment that the undisputed material facts in this case did not permit Ienco to pursue a malicious prosecution theory against either the officers or the City. The district court correctly found that Ienco failed to prove that the proceedings were terminated in a manner indicative of his innocence, as

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[1] In the criminal case, the City chose not to dispute Judge Coar's findings of fact on appeal. Likewise, in this case, the government's admissions, both for summary judgment and at oral argument, leave us with no doubt that at least some portion of the officers' testimony was fabricated.

[2] Although we entered an intervening opinion on certain evidentiary matters, *United States v. Ienco*, 126 F.3d 1016 (7th Cir.1997) ("*Ienco II*"), those matters were ultimately resolved by the final appeal.

required by state law. *See Joiner v. Benton Community Bank*, 82 Ill.2d 40, 45, 411 N.E.2d 229 (1980). Since it was settled that a valid state claim was a necessary prerequisite for a Section 1983 claim of malicious prosecution, the district court held that the resolution of the state law claim resolved Ienco's federal claims as well. *See Cervantes v. Jones*, 188 F.3d 805, 809 (7th Cir.1999); *Washington v. Summerville*, 127 F.3d 552, 557 (7th Cir.1997). Because Ienco's Section 1983 claim was thus entirely foreclosed, summary judgment was entered for the defendants. This appeal followed.

II. ANALYSIS

We review the district court's decision granting summary judgment de novo. *Grube v. Lau Indus., Inc.*, 257 F.3d 723, 727 (7th Cir.2001). As we must, we review the evidence in the light most favorable to Ienco as the nonmoving party, and we make all reasonable and justifiable inferences in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

A. *Newsome* and Ienco's Malicious Prosecution Claim

The standards for a successful Section 1983 action against local police officers or a municipality are well known. To prove the officers' liability, Ienco must show that (1) he was deprived of a federal right and (2) that the deprivation was imposed upon him by one or more persons acting under color of state law. *See Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). To establish liability for the City of Chicago, Ienco must prove that: (1) he suffered a deprivation of a federal right; (2) as a result of either an express municipal policy, widespread custom, or deliberate act of a decision-maker with final policy-making authority for the City; which (3) was the proximate cause of his injury. *See Monell v. New York City Department of Social Services*, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); *Frake v. City of Chicago*, 210 F.3d 779, 781 (7th Cir.2000).

At the outset, there is much agreement about Ienco's claims before us. First, all parties agree that the state law claims were properly decided by the district court. This is clear, because Ienco cannot meet his burden of proving under Illinois law that the criminal proceedings terminated in a manner indicative of his innocence. Likewise, the parties agree that our intervening decision in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir.2001), discussed below, effectively bars Ienco's malicious prosecution claim as presented to the district court on summary judgment. Therefore, the principal question remaining is whether Ienco's allegations, coupled with our intervening decision in *Newsome*, provide Ienco with opportunity to pursue a constitutional remedy sufficient to defeat summary judgment. As we explain below, we conclude that such a remedy exists. We must also address whether, at this stage, the officers are entitled to absolute or qualified immunity. As we also explain below, we find that they are not.

The unique procedural posture of this case requires some elaboration. As the law existed at the time this case was filed, the district court's disposition of the state law malicious prosecution claim would have ended the analysis, and summary judgment would have been properly awarded to the defendants. However, after the district court granted summary judgment in favor of the officers, we decided *Newsome*.[3]

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[3] *Newsome* explicitly rejected portions of four of our recent opinions. As such, the District Court should not be faulted for following the law as we had previously explained it. *See Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir.1996) (noting that the question of which constitutional amendment was implicated in a Section 1983 malicious prosecution claim was still "somewhat unclear").

In *Newsome*, we withdrew dicta in four of our previous opinions [4]—which had each been understood to permit Section 1983 malicious prosecution claims but bar similar claims asserting that defendants' actions violated due process rights. *Newsome* clarified the proper analysis, by holding that Section 1983 provides a remedy for certain forms of trial-based government misconduct based on violations of due process—not claims of malicious prosecution. Specifically, we held that "claims of malicious prosecution should be analyzed not under the substantive due process approach [embodied by the malicious prosecution formula], but under the language of the Constitution itself." *Newsome*, 256 F.3d at 751. *Newsome* teaches that, under these circumstances, the plaintiff must allege that the officers withheld information or evidence necessary for the fair and impartial trial guaranteed by the U.S. Constitution. Ultimately, we held that Newsome's constitutional claim of malicious prosecution failed as a matter of law. Nonetheless, we recognized that Newsome did have a federal due process claim—that taking the facts as alleged "he did not receive a fair trial if the prosecutors withheld material exculpatory details." *Newsome*, 256 F.3d at 752.

Because our decisions prior to *Newsome* had been reasonably read to foreclose a due process action under facts similar to those in this case, we did not penalize Newsome for failing to convincingly argue such a cause of action at summary judgment. Similarly, under the facts of this case and the law at the time, Ienco had only one valid

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[4] *Cervantes v. Jones*, 188 F.3d 805, 809 (7th Cir.1999); *Sneed v. Rybicki*, 146 F.3d 478, 480 (7th Cir.1998); *Washington v. Summerville*, 127 F.3d 552, 558-59 (7th Cir.1997); *Reed v. Chicago*, 77 F.3d 1049, 1051 (7th Cir.1996). Our decisions in each of those cases attempted to decipher the Supreme Court's opinion in *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), a subject addressed at length in *Newsome*, 256 F.3d at 750-51.

constitutional claim to pursue—malicious prosecution.[5] After *Newsome*, Ienco still has only one timely constitutional claim to pursue—but it is for a violation of his due process rights under the 14th Amendment. Because *Newsome* was an intervening change in the law that benefits Ienco, he is entitled to take advantage of it on remand. *See, e.g., Molnar v. Booth*, 229 F.3d 593, 599 (7th Cir.2000). On remand, Ienco should be permitted to amend his complaint to include allegations relevant to a viable due process claim under *Newsome*.

B. Officers' Defenses—Waiver and Immunity

Notwithstanding our disposition of Ienco's constitutional remedy, the defendant officers contend that summary judgment was appropriate for three additional reasons, because: (1) Ienco failed to present a due process argument to the court below; (2) the officers are entitled to absolute testimonial immunity; and (3) the officers' conduct was not explicitly proscribed by our previous opinions.[6] We reject each of these contentions in turn.

1. Waiver of due process claim

Although the officers contend that Ienco did not properly raise his due process claim, we disagree. First, Ienco's complaint was sufficiently detailed to put the defendants on notice of his due process claim, and he explicitly alleged that

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[5] Our district courts consistently interpreted our opinions prior to *Newsome* in accordance with Ienco's strategy in the district court below. *See, e.g., Ewing v. O'Brien*, 60 F.Supp.2d 813, 817 (N.D.Ill.1999) ("no court has yet agreed with the notion that reconciling *Albright* with Seventh Circuit precedent forecloses a malicious prosecution claim under § 1983").

[6] It is not seriously disputed that Ienco's due process claim arose only when proceedings were terminated in his favor. As such, the timeliness of his claim is not at issue. *See Sneed v. Rybicki*, 146 F.3d 478 (7th Cir.1998).

"the acts complained of deprived plaintiff of his right . . . not to be deprived of liberty without due process of law." *Complt.* at 98. The defendants' response and motion to dismiss explicitly recognized Ienco's due process claim, because they responded that "plaintiff cannot base his claim against City upon allegations of a due process violation." *City resp.* at 7.

Further, as the district court recognized in its detailed and thorough opinion, it would have been a futile effort for Ienco to seriously pursue a due process claim prior to *Newsome.*[7] To that end, after the initial stages of this case were heard before the district court, Ienco conceded that *Smart v. Board of Trustees of Univ. of Illinois*, 34 F.3d 432 (7th Cir.1994) effectively prohibited a malicious prosecution claimant from proceeding under the due process clause directly—a path that we explicitly set out for the first time in *Newsome. See Smart*, 34 F.3d at 434 (holding that a malicious prosecution claimant's "only constitutional remedy is under the Fourth Amendment (as made applicable to the states by the Fourteenth) and not under the due process clause directly"). Under these circumstances, we decline to hold that Ienco waived his due process claim.

2. Absolute Immunity

Next, the officers claim that they are entitled to absolute immunity because their alleged perjury is protected as a matter of law—both before and during Ienco's criminal trial proceedings. *See Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). Ienco contends that this view of the case is too narrow: he alleges that the officers actively withheld testimony and evidence—thus placing their conduct outside of the safety of trial-based immunity. We agree with the officers' general statement of law. Nonetheless, as Ienco properly contends, our inquiry does not end there.

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[7] *See Memorandum of Summary Judgment*, fn. 1.

If Ienco were merely claiming damages based upon the officers' perjured testimony, the officers would be entitled to absolute immunity. *See Curtis v. Bembenek*, 48 F.3d 281, 285 (7th Cir.1995). However, Ienco's claims are not based upon the officers' perjured testimony. Instead, he argues that the officers withheld exculpatory information and lied to the federal prosecutors who successfully indicted him. Neither the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir.1988).[8] Therefore, no absolute testimonial immunity attaches to the actions of the officers outside of trial, and they are proper defendants in this action.[9]

3. Qualified Immunity

Finally, there is the familiar matter of qualified immunity. To determine if immunity attaches to the actions of the officers, we undertake the two-part qualified immunity test described most recently in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). As *Saucier* teaches, first we ask whether Ienco has made out a violation of a

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[8] Contrary to counsel's argument before us, the concerns raised in *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir.1994), are not implicated here. Unlike the facts in *Buckley*, Ienco alleges that the officers misled Ienco as well as the prosecutors and the Federal Bureau of Investigation. Such conduct is not protected by absolute immunity.

[9] Because plaintiff's claims ultimately rest in part on conduct that occurred before and after trial, we need not decide at this point whether and to what extent the complaining witness exception applies. The district court is best equipped to handle this fact-intensive issue. *See Cervantes v. Jones*, 188 F.3d 805, 809-10 (7th Cir.1999) (discussing police officer immunity when officers act as complaining witnesses at trial).

constitutional right. Second, we ask whether that right was clearly established at the time that the disputed conduct took place.

As to the first prong of *Saucier*, we note that Judge Coar's meticulous and unchallenged factual findings demonstrate that the officers engaged in conduct that violated the Fourth Amendment and could also have violated Ienco's 14th Amendment due process rights. *See Jones v. City of Chicago*, 856 F.2d at 994 (noting "at some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth Amendment to the due process clause"). Ienco's Fourth Amendment claims expired two years after his arrest. *See Newsome*, 256 F.3d at 749. Accordingly, his due process claims are limited to the officers' actions (or non-actions) that occurred following his arrest and only to those actions that were not protected by testimonial immunity. As to *Saucier*'s second prong, if Ienco's allegations are proved, the officers' conduct violated clearly established federal law which was known or should have been known by a reasonable officer in 1995. *See, e.g., Jones v. City of Chicago*, 856 F.2d at 992. Therefore, in order to determine if the officers are entitled to qualified immunity, we remand this fact-intensive issue to the district court to determine if the officers engaged in conduct that violated Ienco's due process rights.

C. City's Liability

Given our reversal of summary judgment as to the officers, Ienco contends that we must similarly reverse the district court's judgment in favor of the City. He is mistaken. In order to establish municipal liability under Section 1983, the plaintiff must prove that a "custom or policy of the City was a cause of the plaintiff's injury." *Jones v. City of Chicago*, 856 F.2d at 995; *see also Cornfield by Lewis v. Consolidated High School Dist. No. 230*, 991 F.2d 1316 (7th Cir.1993).

True, Ienco's complaint made bare-bones allegations about the City's customs and policies—in general. However, Ienco introduced no material evidence at summary judgment that Officers Angarone or McGann were acting pursuant to an official custom or policy of the City of Chicago. We also note that nowhere has Ienco suggested that the actions of Officers Angarone or McGann extended beyond their role in his particular case. *See Williams v. Heavener*, 217 F.3d 529, 532 (7th Cir.2000) ("Ordinarily, one incident is not sufficient to establish a custom that can give rise to *Monell* liability.") Therefore, we affirm judgment as to the City.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court as to the City of Chicago, and REVERSE the judgment of the district court as to Officers Angarone and McGann and REMAND the case for further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. ILLINOIS
EASTERN DIVISION

No. 00 C 3831

JOSEPH IENCO,

Plaintiff,

v.

CITY OF CHICAGO, a municipal corporation, P.O. Kenneth Angarone, individually and in his official capacity as a member of the Chicago Police Department, and P.O. Thomas McGann, individually and in his official capacity as a member of the Chicago Police Department,

Defendants.

May 2, 2001

MEMORANDUM OPINION AND ORDER

CASTILLO, *District Judge.*

Joseph Ienco filed this lawsuit under 42 U.S.C. § 1983, claiming that the City of Chicago and Police Officers Keith Angarone and Thomas McGann violated Ienco's civil rights by subjecting him to malicious prosecution. Ienco also asserts unspecified violations of his rights under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments, and a pendent state law claim of malicious prosecution.[1] Defendants moved

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[1] Ienco failed to develop any of his claims under the First, Fourth, Fifth, or Eighth Amendments in his responsive pleadings, and later withdrew "such claims [under the First, Fifth, and Eighth Amendments]

for summary judgment on all claims pursuant to Fed.R.Civ.P. 56, on the grounds that Ienco failed to state either a federal or state law claim for malicious prosecution and that Ienco's other claims are either time-barred or unsupported by the alleged facts. For the reasons stated below, we grant Defendants' motion for summary judgment on all claims.

RELEVANT FACTS

In August 1994, Ienco and Gregory Iovine, a business associate of Ienco's, traveled from New York to Chicago to meet with Jerome Greenberg. They did so at the request of a third party to whom Greenberg allegedly owed a business debt. According to Iovine, he and Ienco traveled by Amtrak train because train stations, unlike airports, do not have metal detectors. This was important because Ienco and Iovine carried a .357 magnum revolver, a .380 caliber semiautomatic pistol equipped with a silencer, forty-five rounds of ammunition for the guns, and one pound of explosive powder along with fuses and other components reportedly suitable for use in constructing a pipe bomb.

On August 29, 1994, Ienco and Iovine twice sought to meet with Greenberg, both times without an appointment and without Greenberg's permission to enter his office. On their first attempt, they succeeded in entering Greenberg's office and recommended that he repay the alleged debt. Greenberg requested that the two leave his office and said if they did not he would call the police. Ienco and Iovine left Greenberg's office, telling him that he would see them again. (R. 17, Defs.' 56.1(a)(3) Statement of Facts, Tab I, Indictment at 4, ¶ 8.)

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as being outside the scope of a malicious prosecution claim." (R. 13, Pl.'s Mem. in Opp'n to Def. City of Chicago's Mot. to Dismiss at 17 n. 5.) Therefore, we find that he has abandoned and waived these claims. Moreover, the Court independently finds that Ienco could not have sustained any of these constitutional claims had he pursued them.

On Ienco and Iovine's second attempt to meet with him, Greenberg spotted them on the building's closed-circuit television security system and had his secretary call the police. Officers Angarone and McGann responded to the call. Angarone and McGann stopped Ienco and Iovine outside the building, searched them, and detained the two men by placing them in the back of the squad car while the officers investigated the incident.

The parties differ as to the timing of this event. Ienco states that he and Iovine were detained by the police immediately upon the officers' arrival at the building, before the officers had any information linking them to the reported disturbance within the building. The police officers contend that they first conferred with a witness who identified Ienco and Iovine and then detained them when they exited the building. Both sides agree that Ienco and Iovine remained in the back of the squad car for approximately one-half hour while the officers conferred with Greenberg.

During that half-hour, the officers interviewed Greenberg and another witness, and Greenberg signed a complaint alleging criminal trespass against Ienco and Iovine. The police officers then informed the two men that they were under arrest and drove them to the police station.

The police officers later returned to the scene of the arrest to look for a rental car that matched a set of keys the officers acquired from Ienco.[2] They located the car and searched it, finding a briefcase containing the two firearms. Both guns were loaded. The explosives were found during a search of Ienco's hotel room on August 30, 1994.

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[2] The police officers allege that they found the car keys hidden in the back of the squad car. Ienco, however, alleges that the police officers confiscated the car keys at the time they searched him. Iovine reportedly had told the officers that he and Ienco had taken a taxi to Greenberg's office.

The police officers filed a report of the arrest, and, on August 31, turned the investigation over to a Special Agent of the Federal Bureau of Investigation. The Special Agent filed a federal complaint, and in October a federal grand jury was convened. The grand jury eventually indicted Ienco and Iovine on five counts of violating federal law.

Ienco and Iovine moved to suppress various pieces of evidence found subsequent to their arrest, including the firearms, the explosives, and a post-arrest statement by Iovine. The motion was denied, and Iovine subsequently entered into a plea agreement with the government. Ienco elected to proceed to trial and was convicted of five counts of violating federal law, including conspiracy to commit extortion, interstate travel in aid of racketeering, and using or carrying firearms during and in relation to a crime of violence.

Ienco appealed both his criminal conviction and the denial of his motion to suppress evidence. The Court of Appeals found errors at both the suppression hearing and at trial. The critical question at the suppression hearing, the Court of Appeals found, was whether the officers had probable cause to arrest Ienco and Iovine at the moment they placed them in the squad car because their detention in the car was tantamount to an arrest. Ienco and the officers told different versions of the events leading up to that moment. If the court accepted the officers' version, the arrest was valid and the subsequently-recovered evidence was admissible. On the other hand, if Ienco's version was believed, the arrest was without probable cause and the evidence acquired as a result of that arrest would then be inadmissible "fruit of the poisoned tree." *See Wong Sun v. United States*, 371 U.S. 471, 484-86, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *United States v. Ingrao*, 897 F.2d 860, 866 (7th Cir.1990).

At the suppression hearing, Ienco's attorney called a witness who previously had given deposition testimony that

tended to corroborate Ienco's version of the arrest. On direct examination, that witness instead said that she had been distracted by a telephone call and had not actually seen the early stages of the incident. The attorney attempted to treat this witness as adverse and impeach her by using leading questions, a technique that was proper under Fed.R.Evid. 607. The trial judge, nevertheless, sustained the government's objection to this technique and sanctioned Ienco's attorney by striking all of the witness's testimony. The Court of Appeals found this was prejudicial error because the successful impeachment of the witness's testimony might have persuaded the trial court to accept Ienco's version of the arrest. The Court of Appeals therefore ordered a new suppression hearing and directed the trial court to determine at that hearing "whether Ienco or the officer is believed." *United States v. Ienco*, 92 F.3d 564, 569 (7th Cir.1996).

Turning its attention to Ienco's trial, the Court of Appeals found that there were two errors in the jury instructions, which combined to constitute prejudicial error. First, the Court of Appeals found that the instruction given to the jury on Ienco's firearm offense, although proper when it was given, was erroneous. *Id.* at 570. Ienco was charged with "using or carrying" a firearm in the commission of a crime, and the jury was instructed that Ienco could be convicted on this charge if the jury merely found that he knowingly possessed the firearm at the time. But in *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), which was decided after Ienco's conviction but before his appeal, the Supreme Court held that the proper jury instruction for this offense would require the jury to find that a defendant actively employed the firearm, at a minimum by brandishing or waving it, rather than merely having it in his possession. *Id.* at 142-50, 116 S.Ct. 501. Thus, the jury instruction given at Ienco's trial was error. *Ienco*, 92 F.3d at 570.

The Court of Appeals also found that the trial judge had committed error when, late in the trial, he reversed his earlier decision and announced that he would give the jury a *Pinkerton* instruction under which Ienco could be held responsible for crimes committed by his co-conspirator Iovine. *Id.* at 569 (citing *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946)). With the judge's prior assurance that the *Pinkerton* instruction would not be given, Ienco's attorney argued that the more serious firearm offenses were committed by Iovine. When the judge later announced that he intended to give a *Pinkerton* instruction after all, that defense strategy became a trap for Ienco since he could now be held responsible for crimes he had tried to prove Iovine had committed.

Ienco had not objected at trial to the erroneous jury instruction, so the standard of review should have been that of plain error. But the government argued on appeal that the error was not prejudicial beyond a reasonable doubt. By so doing, the Court of Appeals found that the government waived the correct and less stringent standard of plain error. Therefore, the Court of Appeals found that the use of this instruction was reversible error. In view of the multiple jury instruction errors, the Court of Appeals remanded the case for a new trial, irrespective of the outcome of the second suppression hearing.

At the second suppression hearing, the district court determined that the officers' version of the arrest was not credible. The court found that the officers had detained Ienco and Iovine in the squad car before there was probable cause to effect an arrest.[3] As such, the arrest was illegal and all of

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[3] Because the officers retained both men's personal effects, and the squad car's rear-seat doors and windows could not be opened from the inside, the court determined that Ienco and Iovine's detention in the back of the car while the officers investigated the complaint amounted to an

the evidence found as a result of that arrest, including the firearms in the rental car and the explosives in the hotel room, was inadmissible. *United States v. Ienco*, No. 94 CR 586, 1998 WL 249233, at *8 (N.D.Ill. May 11, 1998). Therefore, Ienco's motion to suppress the evidence was granted.[4] *Id.*

The government subsequently withdrew its indictments against Ienco. Ienco then brought these claims of malicious prosecution against Angarone, McGann, and the City of Chicago. Defendants Angarone and McGann have filed a motion for summary judgment pursuant to Fed.R.Civ.P. 56 for failure to state a valid claim for relief under 42 U.S.C. § 1983.

LEGAL STANDARDS

Summary judgment is proper when the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 150 (7th Cir.1994). In determining whether a genuine issue of material fact exists, the court must construe all facts in the light most favorable to,

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arrest. *United States v. Ienco*, No. 94 CR 586-1, 1997 WL 392188, at *3 (N.D.Ill. July 3, 1997).

[4] The procedural history is somewhat more complicated than this summary implies. On remand, the district court partially granted Ienco's motion to suppress but retained jurisdiction over the remainder. The government appealed. Ienco moved to dismiss on the basis that the government lacked jurisdiction to appeal, since his motion was in part still before the district court. The Court of Appeals instructed the district court to grant the motion to suppress in its entirety, in order to bring all appealable issues to ripeness at the same time. This the district court did, and the government appealed the full grant of the motion to dismiss. The Court of Appeals affirmed the district court's grant of Ienco's motion to suppress, holding that the arrest was premature and the physical evidence and co-defendant Iovine's custodial statements and trial testimony must be suppressed. *Ienco*, 1998 WL 249233.

and draw all reasonable inferences in favor of, the non-moving party. *Pafford v. Herman*, 148 F.3d 658, 665 (7th Cir.1998).

ANALYSIS

Ienco brings this action under 42 U.S.C. § 1983 against the City of Chicago and against Police Officers Angarone and McGann, both individually and in their official capacities as members of the Chicago Police Department. A suit against a government officer in his official capacity is actually a suit against the government entity for which the officer works. *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). As such, Ienco's claims against the City of Chicago are redundant to those against the police officers in their official capacity.[5]

Section 1983 provides that any person who, under color of law, causes the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. An action against a municipality is one against a "person" for purposes of § 1983. *Monell*, 436 U.S. at 689, 98 S.Ct. 2018. To bring a § 1983 action against a municipality, a plaintiff must allege three things: (1) that he suffered a deprivation of a constitutional right; (2) as a result of either an official policy or custom; (3) which was the proximate cause of his injury. *Johnson v. City of Chicago*, 711 F.Supp. 1465, 1467 (N.D.Ill.1989). It is unnecessary for this Court to reach the analysis of either "official policy or custom," or that of proximate cause, however, because Ienco has failed to establish any valid claim that he was subjected to the constitutional injury he alleges, *i.e.* malicious prosecution.

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[5] In fact, the Court stayed the proceedings against the City of Chicago pending resolution of this motion.

A. Ienco's Claim Fails to State a Valid Cause of Action for Malicious Prosecution

The federal and state causes of action are linked. To bring a § 1983 action for malicious prosecution, a plaintiff must allege that he has satisfied the requirements of a state law cause of action for malicious prosecution. *Cervantes v. Jones*, 188 F.3d 805, 809 (7th Cir.1999). As explained below, the Illinois state law cause of action for malicious prosecution has five required elements. *See Washington v. Summerville*, 127 F.3d 552 at 557 (7th Cir.1997) (citations omitted). To prevail on the state law claim, a plaintiff must prove every one of these elements. *Id.* (citing *Swick v. Liautaud*, 169 Ill.2d 504, 215 Ill.Dec. 98, 662 N.E.2d 1238, 1242 (1996) (additional citations omitted)).

Ienco's claims for malicious prosecution fail as a matter of law for two distinct reasons, either of which would be sufficient to grant full summary judgment in favor of Defendants. Ienco fails to satisfy at least two of the five required elements of the Illinois state law cause of action, and because the federal cause of action requires that he satisfy all elements of the state claim, Ienco's federal claim fails as well.

To state a claim for malicious prosecution under Illinois law, a plaintiff must allege that: (1) the defendant commenced or continued an original criminal or civil proceeding; (2) the proceeding terminated in the plaintiff's favor; (3) the proceeding was without probable cause; (4) the defendant acted maliciously in initiating or continuing the proceeding; and (5) the plaintiff was injured. *Washington*, 127 F.3d at 557 (citations omitted). All of these elements must be proven or the claim fails. *Id.* (citing *Swick*, 215 Ill.Dec. 98, 662 N.E.2d at 1242 (additional citations omitted)).

For the purposes of a motion for summary judgment, Ienco's incarceration subsequent to his conviction on criminal charges arguably meets the requirement of a legal injury

specified in the fifth element of the cause of action. Ienco's claim, however, fails to meet at least two of the four other required elements.[6]

1. The Proceedings Did Not Terminate in Plaintiff's Favor

In order to satisfy the second element of the state law malicious prosecution cause of action, a plaintiff has the burden of proving that the underlying criminal proceeding terminated in a manner indicative of his innocence. *See Washington*, 127 F.3d 552. Thus, a plaintiff claiming malicious prosecution must be innocent of the crime charged in the underlying prosecution. *Hector v. Watt*, 235 F.3d 154, 156 (3d Cir.2000). *See also* Prosser and Keeton on the Law of Torts 885 (5th ed.1984) (citing Restatement of Torts § 657) ("[I]t is always open to the defendant to escape liability by showing in the malicious prosecution suit itself that the plaintiff was in fact guilty of the offense with which he was charged."). A favorable termination, for purposes of a malicious prosecution claim, must be one that deals with the factual issues of a case. *Cult Awareness Network v. Church of Scientology Int'l*, 177 Ill.2d 267, 226 Ill.Dec. 604, 685 N.E.2d 1347, 1350 (1997) (citations omitted).

In this case, the factual issues are whether Ienco did, in fact, illegally transport firearms and explosives to Chicago, attempt extortion, and carry or use those firearms in the attempt. The termination of this case did not ultimately deal with these issues. Although Ienco was convicted of the criminal charges against him, the conviction was vacated as a result of technical errors by the trial judge, and the matter was

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[6] The first element, whether Defendants commenced or continued criminal proceedings, and the fourth element, malicious intent, are mixed questions of fact and law, which this Court finds unnecessary to consider because Ienco's claim fails to establish two other required elements of the state law cause of action.

remanded for a new suppression hearing and a new trial. *Ienco*, 92 F.3d at 569-70. Ienco's motion to suppress the evidence against him was subsequently granted because the court found that the evidence was discovered as the result of an arrest made before probable cause was established, *Ienco*, 1997 WL 392188, at *6, and the government withdrew its indictments.

A conviction based on reliable evidence that is later suppressed under the Fourth Amendment does not prove innocence of the crime charged. *Gonzalez v. Entress*, 133 F.3d 551, 555 (7th Cir.1998). The criminal proceedings against Ienco were terminated by withdrawal of the indictment against him, subsequent to his successful motion to suppress the evidence found after his arrest. This is neither a finding indicative of innocence nor one that deals with the factual issues of the case. It does not qualify as a favorable termination of his criminal proceedings, and Ienco's claim therefore fails the second prong of the state law cause of action.

2. There Was Probable Cause for the Criminal Proceedings

Assuming, *arguendo*, that Ienco could satisfy the other elements of the state law cause of action for malicious prosecution, he must still show that the proceedings against him were initiated or continued without probable cause. Ienco also fails to demonstrate this element as well.

A grand jury indicted Ienco on five counts of violating federal law. Under Illinois law, a grand jury indictment is prima facie evidence of probable cause. *Bontkowski v. United States*, 28 F.3d 36, 37 (7th Cir.1994). Ienco, citing *Tribblet v. Sanchez*, No. 95 C 6816, 1997 WL 106303, at *3 (N.D.Ill. Feb.12, 1997), maintains that the "officers cannot claim they had probable cause if the evidence upon which probable cause was based was obtained in an unconstitutional

manner." (R. 21, Pl.'s Mem. Opp'n to Defs. Angarone and McGann's Mot. Summ. J. at 14.) *Tribblet* is inapplicable here: Ienco confuses probable cause for arrest with probable cause for prosecution. In *Tribblet*, the arresting officers attempted to use evidence they seized in an illegal search to show they had probable cause to conduct that search in the first place. The *Tribblet* Court properly rejected this post-hoc rationale and held that the search was unconstitutional. *Tribblet*, 1997 WL 106303, at *3. The Illinois state law cause of action for malicious prosecution, however, refers not to a lack of probable cause for the arrest but to a lack of probable cause for the prosecution.

In this case, at the time the decision to prosecute Ienco was made, the authorities had evidence that Ienco and Iovine had illegally transported two firearms, ammunition, and explosives from New York to Chicago, with the apparent intent of using them to collect an alleged business debt. Moreover, a state law criminal complaint had been filed, followed by a federal complaint, and the men had been indicted by federal grand jury. There was more than adequate probable cause to bring criminal proceedings against Ienco and Iovine. That the Court of Appeals later determined that Angarone and McGann did not have probable cause to arrest Ienco and Iovine when they did does not operate retroactively to negate the fact that probable cause existed to initiate criminal proceedings against them. Ienco fails to show that the proceedings against him were brought without probable cause.

B. Claims Against the City of Chicago are Dismissed

Ienco's claims against the City of Chicago depend entirely on finding Defendant officers, in their official capacities, liable under § 1983. *See Monell*, 436 U.S. 658, 98 S.Ct. 2018. Because this Court finds that all of Ienco's claims against the officers are without merit, Ienco's claims against the City of Chicago are dismissed.

CONCLUSION

For the foregoing reasons, Angarone and McGann's motion for summary judgment, (R. 18-1), is granted as to all of Ienco's claims against them, both personally and in their official capacities. Furthermore, Ienco's claims against the City of Chicago are dismissed. The Clerk of the Court is directed to enter final judgment, pursuant to Fed.R.Civ.P. 58, against Ienco and in favor of the defendants.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS

[Filed June 20, 2002]

No. 01-2395

JOSEPH IENCO,
Plaintiff-Appellant,

v.

CITY OF CHICAGO, a municipal corporation, P.O. KENNETH ANGARONE, individually and in his official capacity as a member of the Chicago Police Department, and P.O. THOMAS MCGANN, individually and in his official capacity as a member of the Chicago Police Department,
Defendants-Appellees.

Appeal from the United States District Court
for the Northen District of Illinois, Eastern Division
No. 00-C-3831
Ruben Castillo, *Judge.*

Before Hon. John L. Coffey, Hon. Daniel A. Manion, and Hon, Ann Claire Williams, *Circuit Judges.*

ORDER

On consideration of the petition for rehearing filed by counsel for Defendants-Appellees Kenneth Angarone and Thomas McGann on April 25, 2002, all members of the original panel have voted to DENY the petition for rehearing. No member of this court has requested a vote on the petition to rehear this case en banc.

Accordingly, the petition for rehearing is DENIED.